

STATE OF MICHIGAN
COURT OF APPEALS

THE POGODA GROUP,

Plaintiff-Appellant,

v

FOWLERVILLE MINI STORAGE, INC.,

Defendant-Appellee.

UNPUBLISHED

May 29, 2001

No. 219883

Oakland Circuit Court

LC No. 98-002742-CK

Before: K.F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Plaintiff, a real estate broker, brought this action to recover a commission allegedly due under the parties' listing agreement. The trial court denied plaintiff's motion for summary disposition, and instead granted defendant's motion for summary disposition under MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

The parties' listing agreement provided as follows:

If, during the term of this agreement, anyone sells the Property or produces a purchaser, ready, willing and able to purchase the Property upon the terms listed herein or on other terms acceptable to me, or if within twelve (12) months after this agreement expires, anyone sells the Property to or with anyone with whom or to whom anyone, during the terms of this agreement, had negotiations for the sale of the Property, exhibited the Property or had any oral or written contact as a prospective purchaser for the Property, then I will pay you a commission of 7.0% of the gross sale price due and payable in full at closing. You will supply a list of contacted prospective purchasers within fifteen (15) days after the expiration of this agreement.

The "terms listed herein" provided that the sale price was to be \$800,000, on terms "TO BE MUTUALLY AGREED UPON BETWEEN BUYER AND SELLER." Defendant was also obligated to pay the commission if defendant prevented a sale: "If a sale is not consummated because of my inability, failure or refusal to perform, then the full commission shall be due and payable upon such occurrence."

Plaintiff produced a number of purchasers, some of whom were ready, willing, and able to pay the full sale price of \$800,000. However, these prospective purchasers desired to pay a large portion of the sale price over time at a specific rate of interest. Defendant contended that the durations of payment and rates of interest were unacceptable and, therefore, it refused the proposals. At one point, defendant requested that plaintiff take the property off the market, but later requested that the property be re-listed for sale. After the six-month listing agreement expired, plaintiff produced a purchaser who was ready, willing, and able to purchase the property for the full sale price, in cash. Defendant still refused to consummate the sale.

We review de novo the trial court's decision whether to grant a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* at 120. We hold that the trial court did not err.

Plaintiff was defendant's real estate broker. "A broker is an agent with special and limited authority, one who is employed by another to negotiate for specific property with the custody of which he has no concern." *Stephenson v Golden*, 279 Mich 710, 735; 276 NW 849 (1937); see also *Andrie v Chrystal-Anderson & Assoc Realtors, Inc*, 187 Mich App 333, 335; 466 NW2d 393 (1991) (noting that a real estate broker is the agent of the seller). A real estate broker's compensation is called a "commission," which implies compensation "for services rendered in making a sale." *Ferrell v Auto Club of Michigan*, 148 Mich App 165, 169; 383 NW2d 623 (1986), quoting *Smith v Starke*, 196 Mich 311, 314; 162 NW 998 (1917). Thus, absent a special agreement otherwise, a broker earns the commission when the seller enters into a binding agreement with a purchaser, i.e., when a sale is made. *Rellinger v Bremmeyr*, 180 Mich App 661, 666; 448 NW2d 49 (1989). Where, as here, a listing agreement exists, "[t]he court must look to the terms of the contract to determine how the commission was to be earned." *Hawkins v Smithson*, 181 Mich App 649, 652; 449 NW2d 676 (1989). In order to recover the commission, the broker must show that it performed the contractual requirements. *Id.*; *Craib v Committee on Nat'l Missions of the Presbytery of Detroit of the United Presbyterian Church, USA*, 62 Mich App 617, 622-623; 233 NW2d 674 (1975).

In the instant case, the property was not sold. The parties' agreement provided, in part, that defendant would pay plaintiff a 7% commission if plaintiff produced "a purchaser, ready, willing and able to purchase the Property upon the terms listed herein or on other terms acceptable to me" The "terms listed herein" stated that the sale price was \$800,000, on terms "to be mutually agreed upon between buyer and seller." Plaintiff argues that it earned the commission because it produced purchasers who were ready, willing, and able to purchase the property at the full sale price of \$800,000. However, none of these prospective purchasers was ready, willing, and able to purchase the property on terms that were acceptable to defendant, as required by the agreement. "When a realtor does not produce a purchaser ready, willing, and able to buy in accord with the terms of the agreement with the owner or within the time therein provided he has not earned the commission." *Cunningham v Garber*, 361 Mich 90, 94; 104 NW2d 746 (1960).

Plaintiff argues that it earned the commission by producing, after the agreement expired, purchasers who were ready, willing, and able to purchase the property on terms that were acceptable to defendant. Specifically, plaintiff presented defendant with a letter of intent from a prospective purchaser, expressing an intent to purchase the property for the full sale price, to be paid in cash. However, the listing agreement had expired. The agreement did provide that the commission would be owed if the property was sold, within twelve months after the agreement expired, to a purchaser who had been contacted by plaintiff. However, the agreement did not provide that the commission was earned by simply producing a ready, willing, and able purchaser within twelve months after the agreement expired. Rather, an actual sale was required to earn the commission after the agreement expired. Here, the property was never sold.

Alternatively, plaintiff argues that it was entitled to the commission because defendant wrongfully prevented plaintiff from earning it. The default provision of the listing agreement provided that “[i]f a sale is not consummated because of my inability, failure or refusal to perform, then the full commission shall be due and payable upon such occurrence.” According to plaintiff, defendant’s refusal to sell the property on terms proposed by the prospective purchasers constituted a default. However, plaintiff has not presented any facts with regard to defendant’s interference with the sale of the property.

Where a broker produces a purchaser who is ready, willing, and able to purchase the property on the owner’s terms, the owner may not avoid payment of the commission by wrongfully refusing to complete the sale. *Advance Realty Co v Spanos*, 348 Mich 464, 468-469; 83 NW2d 342 (1957); *Lee v Desenberg*, 2 Mich App 365, 368-369; 139 NW2d 916 (1966). However, if the refusal is a valid exercise of the owner’s rights, and not a bad faith attempt to avoid payment of the commission, the broker is not entitled to the commission. See *Schostak v First Liquidating Corp*, 320 Mich 406, 417; 31 NW2d 673 (1948), overruled on other grounds in *Seelye v Broad*, 379 Mich 289, 291-292; 150 NW2d 785 (1967). In the case at bar, the listing agreement provided that the terms of sale must be agreed to by defendant. Therefore, defendant had the right to insist that the terms of any sale, such as the rate of interest and duration of payment, be acceptable to defendant. Plaintiff has failed to show that defendant’s refusal to consummate a sale with any of the prospective purchasers was a bad-faith attempt to avoid paying the commission. Accordingly, the trial court did not err by granting defendant’s motion for summary disposition.

Plaintiff also argues that, under a quantum meruit theory, it is entitled to compensation for the services it rendered on behalf of defendant. Plaintiff claims that defendant breached the listing agreement when it demanded that the property be taken off the market, and that this breach entitled plaintiff to compensation for the reasonable value of services rendered. See *Reynolds v Polen*, 222 Mich App 20, 24; 564 NW2d 467 (1997) (Attorney hired on a contingent fee agreement was entitled to quantum meruit when wrongfully discharged). However, recovery under the equitable doctrine of quantum meruit is unavailable where an express agreement exists between the parties. *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 716; 376 NW2d 392 (1985). Thus, plaintiff’s recovery, if any, must be based on a breach of contract theory, not a quantum meruit theory.

Furthermore, plaintiff waived any recovery for defendant's breach of the listing agreement, when plaintiff continued to perform under the listing agreement after defendant asked plaintiff to put the property back on the market for sale. A party waives a breach of an agreement where the party elects to continue performance despite the breach. *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper